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CB MEDIA SDN BHD & ANOR v. KESAS SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
SURAYA OTHMAN JCA
STEPHEN CHUNG JCA

B

[CIVIL APPEAL NO: B-02(NCVC)(W)-1495-08-2016]
4 MARCH 2019

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TORT: *Trespass – Structures – Advertising billboard – Erection of – First appellant obtained approval to erect advertising billboard at federal road reserve – Whether respondent wrongfully and without permission took down billboard at location – Appellants sued respondent for losses – Whether unipole advertising structure erected at correct location – Whether appellants carried out survey to verify exact location – Whether unipole advertising structure encroached and trespassed onto land reserve of respondent – Liability of appellants – Whether proved*

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TORT: *Damages – Claim for – Trespassing – Unipole advertising structure encroached and trespassed onto land reserve of respondent – Issue of quantum – Respondent filed counterclaim against appellants for losses and damages suffered – Whether respondent produced strong and cogent evidence to establish counterclaim against appellants – Whether orders on special and general damages ought to be set aside – Whether nominal sum of RM50,000 as damages for trespass fair and adequate*

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The first appellant obtained approval from Kementerian Kerja Raya Malaysia ('KKRM') to erect an advertising billboard at a federal road reserve at KM6.5 FT 190 Jalan Bukit Kemuning from Kampung Baru-Hicom to Klang, near to KM6.5 Kesas Highway which was maintained by the respondent as the highway concession holder. The first appellant also obtained approval from Majlis Bandaraya Shah Alam ('MBSA'). The second appellant entered into an outdoor display contract with Bandar Rimbayu Sdn Bhd in respect of this unipole advertising structure which was erected on or about 29 September 2013. In the suit, the appellants pleaded that on 7 July 2014, the respondent had, wrongfully and without permission, taken down the billboard at the location. On 13 July 2014, the appellants again erected the billboard at the same location which was taken down again by the respondent on 14 July 2014. The appellants pleaded that for the third time they re-erected the billboard at the same location on 29 September 2014 which was again taken down by the respondent on the same day. The appellants pleaded that the wrongful removal of the billboard had caused their client Bandar Rimbayu to terminate the agreement with the appellants. The appellants sued the respondent for losses. The respondent denied any knowledge of any approval given by KKRM for the unipole advertising structure at the location which the respondent pleaded was erected illegally on federal road reserve land under its concession and that it had trespassed onto the respondent's property. The respondent filed a counterclaim against

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the appellants for losses and damages suffered due to delay to the respondent's road widening and upgrading works caused by the obstruction of the unipole structure. After a full trial, the High Court dismissed the appellants' claims and allowed the counterclaim by the respondent. Hence, this appeal by the appellants.

Held (dismissing appeal on issue of liability; setting aside orders on special and general damages)
Per Stephen Chung JCA delivering the judgment of the court:

(1) The location of the unipole structure to be erected was at KM6.5 Jalan Bukit Kemuning and not at KM6.5 Kesas Highway. The two locations were near to each other by a difference of about 30 metres as shown in a land survey plan and in a photograph, showing Kesas Highway running parallel to Jalan Bukit Kemuning with a road reserve in between. In his witness statement, SP2 testified that in approving the location of the structure at KM6.5 FT 190 Jalan Bukit Kemuning, he did not know that it was within the reserve land or right of way of Kesas Sdn Bhd. (para 22)

(2) PW1, the managing director of the appellants, said they applied for the location in Jalan Bukit Kemuning but it did not have any kilometre tag and the location was approved by the authority, KKRM and MBSA. He was asked before KKRM's approval, based on his application, whether he did anything to verify the location and he answered he believed the authority was the one responsible in doing this. Obviously the appellants did not carry out any survey to verify the exact location. Although PW2 testified that based on his site visit that the structure was erected at KM6.5 pursuant to the approvals of KKRM and MBSA, PW2 did not prepare the site plan and was not in a position to confirm the accuracy of the site plan or the location of the unipole advertising structure. The consultants who prepared the site plan were not called to testify as such. Any developer or contractor including the appellants would have, and should have, carried out a survey to confirm its exact location before erecting the unipole advertising structure. (para 23)

(3) Pursuant to a concession agreement between the Government of Malaysia and the respondent, the Government granted exclusive rights and license to the respondent to enter and occupy the land in relation to the highway concession. The respondent had carried out a survey for demarcation of the right of way near KM31.6 – KM31.7 Lebuhraya Shah Alam (Kesas) including verification of unipole billboard encroachment. The survey showed that the unipole advertising structure was located at KM 31.67 Kesas Highway which had encroached onto Kesas Highway. On evidence, the High Court Judge was correct in his finding that the appellants had erected the unipole advertising structure at the wrong location namely at KM6.5 Kesas Highway and not at

KM6.5 FT 190, Jalan Bukit Kemuning as applied and approved and had trespassed onto the land reserve of the respondent. Hence, the appellants failed to prove their claims against the respondent and this court affirmed the High Court's finding of liability. (paras 25 & 26)

(4) However, with regard to the issue of quantum, the High Court Judge had erred in awarding the damages against the appellants as prayed for. The respondent had not produced strong and cogent evidence to establish their counterclaim against the appellants, particularly in respect of the trespass onto Kesas Highway. The respondent submitted that the delay in carrying out its road widening and upgrading works at that location resulted in prolongation costs and penalties at a rate of RM30,000 per day. The respondent did not specifically lead evidence on damages for the trespass and did not give a breakdown of this figure of RM30,000 or how it was derived at in the defence and counterclaim. (paras 27 & 28)

(5) On the next two items of its claims, the respondent submitted that it had to pay Gelumbang Jaya a sum of RM371,000 for breach of contract which had the exclusive right to billboard advertising in Lebuhraya Shah Alam and that it incurred costs of RM38,400 for removal of vinyl. Firstly, the respondent did not produce any invoices, bills or receipts that it had incurred or paid the sums of RM371,000 and RM38,400. Secondly, Gelumbang Jaya and the other unnamed party were not parties in this suit and did not claim against the respondent or the appellants for these sums. Thus, the respondent had failed to prove specifically the damages prayed for in the defence and counterclaim. Therefore, the High Court orders on special and general damages were set aside. This court awarded a nominal sum of RM50,000 as damages for the trespass, which was considered to be fair and adequate. (paras 32 & 33)

Bahasa Malaysia *Headnotes*

Perayu pertama memperoleh kelulusan daripada Kementerian Kerja Raya Malaysia ('KKRM') untuk mendirikan satu papan pengiklanan di rizab jalan persekutuan di KM6.5 FT 190 Jalan Bukit Kemuning dari Kampung Baru-Hicom ke Klang, berdekatan KM6.5 Lebuhraya Kesas yang diselenggara oleh responden sebagai pemegang konsesi lebuhraya. Perayu pertama juga memperoleh kelulusan daripada Majlis Bandaraya Shah Alam ('MBSA'). Perayu kedua memasuki satu kontrak peragaan luar dengan Bandar Rimbayu Sdn Bhd berkaitan dengan struktur pengiklanan unipole ini yang didirikan pada 29 September 2013. Dalam guaman ini, perayu-perayu memplidkan pada 7 Julai 2014, responden, secara salah dan tanpa kebenaran, menurunkan papan iklan itu di lokasi tersebut. Pada 13 Julai 2014, perayu-perayu sekali lagi mendirikan papan iklan pada lokasi yang sama yang telah diturunkan sekali lagi oleh responden pada 14 Julai 2014. Perayu-perayu

memplidkan bahawa, untuk kali ketiga, mereka telah mendirikan semula papan iklan di lokasi yang sama pada 29 September 2014 yang telah diturunkan sekali lagi oleh responden pada hari yang sama. Perayu memplid bahawa kesalahan menurunkan papan iklan itu menyebabkan klien mereka, Bandar Rimbayu, membatalkan perjanjian dengan perayu-perayu. Perayu-perayu menyaman responden untuk kerugian. Responden menafikan apa-apa pengetahuan tentang apa-apa kelulusan yang diberikan oleh KKRM untuk struktur pengiklanan unipole di lokasi tersebut yang diplidkan responden telah didirikan secara tidak sah atas tanah rizab jalan persekutuan di bawah konsesinya dan menceroboh hartanah responden. Responden memfailkan tuntutan balas terhadap perayu-perayu untuk kehilangan dan kerugian yang dialaminya atas kelewatan kerja-kerja pelebaran jalan dan menaik taraf yang disebabkan oleh halangan struktur unipole. Selepas perbicaraan penuh, Mahkamah Tinggi menolak tuntutan perayu-perayu dan membenarkan tuntutan balas responden. Oleh itu, rayuan ini oleh perayu-perayu.

Diputuskan (menolak rayuan atas isu liabiliti; mengetepikan perintah-perintah ganti rugi khas dan am)
Oleh Stephen Chung HMR menyampaikan penghakiman mahkamah:

(1) Lokasi struktur unipole yang sepatutnya didirikan adalah di KM6.5 Jalan Bukit Kemuning dan bukan di KM6.5 Lebuhraya Kesas. Kedua-dua lokasi berdekatan satu sama lain dengan perbezaan lebih kurang 30 meter seperti yang ditunjukkan dalam pelan ukur tanah dan dalam sekeping gambar, yang menunjukkan Lebuhraya Kesas yang selari dengan Jalan Bukit Kemuning dengan satu rizab jalan di tengah-tengah. Dalam kenyataan saksinya, SP2 memberi keterangan bahawa dalam meluluskan lokasi struktur KM6.5 FT 190 Jalan Bukit Kemuning, dia tidak mengetahui kawasan itu dalam lingkungan tanah rizab atau hak lalu lalang Kesas Sdn Bhd.

(2) PW1, pengarah urusan perayu-perayu, menyatakan bahawa mereka telah memohon untuk lokasi di Jalan Bukit Kemuning, tetapi ini tidak mempunyai apa-apa tag kilometer dan lokasi telah diluluskan oleh pihak berkuasa, KKRM dan MBSA. PW1 telah disoal sebelum kelulusan KKRM, berdasarkan permohonannya, sama ada dia telah melakukan apa-apa untuk mengesahkan lokasi dan dia menjawab dia mempercayai pihak berkuasa yang bertanggungjawab berbuat demikian. Perayu-perayu ternyata tidak menjalankan apa-apa tinjauan mengesahkan lokasi sebenar. Walaupun PW2 memberi keterangan bahawa berdasarkan lawatannya ke tapak itu, struktur yang didirikan di KM6.5 menurut kelulusan-kelulusan KKRM dan MBSA, PW2 tidak menyediakan pelan tapak dan tidak mempunyai kedudukan untuk mengesahkan ketetapan pelan tapak atau lokasi struktur pengiklanan unipole. Pakar-pakar yang menyediakan pelan tapak tidak dipanggil untuk memberi keterangan. Mana-mana pemaju atau kontraktor termasuk perayu-perayu sepatutnya, dan seharusnya, menjalankan tinjauan untuk mengesahkan lokasi sebenar sebelum mendirikan struktur pengiklanan unipole.

(3) Dalam menjalankan perjanjian konsesi antara Kerajaan Malaysia dan responden, Kerajaan memberikan hak eksklusif dan lesen kepada responden untuk memasuki dan menduduki tanah itu berhubung dengan konsesi lebuh raya. Responden telah menjalankan tinjauan untuk sempadan hak jalan berdekatan KM 31.6 – 31.7 Lebuhraya Shah Alam (Kesas) termasuk pengesahan pencerobohan papan iklan unipole ke atas Lebuhraya Kesas. Mengikut keterangan, Hakim Mahkamah Tinggi betul dalam mendapati perayu-perayu telah mendirikan struktur pengiklanan unipole di lokasi yang salah iaitu di KM6.5 Lebuhraya Kesas dan bukan di KM6.5 FT 190, Jalan Bukit Kemuning seperti yang dipohon dan diluluskan dan telah mencerobohi rizab tanah responden. Oleh itu, perayu-perayu gagal membuktikan tuntutan-tuntutan mereka terhadap responden dan mahkamah ini mengesahkan dapatan liabiliti yang dibuat oleh Mahkamah Tinggi.

(4) Walau bagaimanapun, berhubungan isu kuantum, Hakim Mahkamah Tinggi terkhilaf dalam mengawardkan ganti rugi terhadap perayu-perayu seperti yang dipohon. Responden tidak mengemukakan keterangan yang kuat dan kukuh untuk membuktikan tuntutan balas mereka terhadap perayu-perayu, terutamanya berhubungan pencerobohan Lebuhraya Kesas. Responden menghujahkan bahawa kelewatan melaksanakan kerja-kerja pelebaran jalan dan peningkatan di lokasi itu mengakibatkan kos-kos perlanjutan dan penalti-penalti pada kadar RM30,000 setiap hari. Responden tidak secara spesifik mengemukakan keterangan berkenaan ganti rugi untuk pencerobohan dan tidak memberikan huraian jumlah RM30,000 atau bagaimana ini diperolehi dalam pembelaan dan tuntutan balas.

(5) Berkenaan dua item lain dalam tuntutan-tuntutannya, responden menghujahkan telah membayar Gelumbang Jaya satu jumlah RM371,000 untuk pelanggaran kontrak yang mempunyai hak eksklusif untuk pengiklanan papan tanda di Lebuhraya Shah Alam dan responden menanggung kos RM38,400 untuk pembuangan vinil. Pertama sekali, responden tidak mengemukakan apa-apa invois, bil-bil dan resit-resit yang telah ditanggungnya atau bahawa responden telah membayar jumlah RM371,000 dan RM38,400. Keduanya, Gelumbang Jaya dan pihak lain yang tidak dinamakan bukan pihak dalam guaman ini dan tidak membuat tuntutan terhadap responden atau perayu-perayu untuk jumlah-jumlah ini. Oleh itu, responden gagal membuktikan secara spesifik ganti rugi yang dituntut dalam pembelaan dan tuntutan balas. Dengan itu, perintah-perintah Mahkamah Tinggi berkenaan ganti rugi khas dan ganti rugi am diketepikan. Mahkamah ini mengawardkan jumlah nominal RM50,000 sebagai ganti rugi untuk pencerobohan, yang dianggap sebagai adil dan mencukupi.

Case(s) referred to:

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd [2014] 6 CLJ 269 FC ***(refd)***

Dr M Mahadevan Mahalingam v. S Lourdenadin & Another Case [1988] 2 CLJ 601; [1988] 1 CLJ (Rep) 168 SC ***(refd)***

Hong Yik Trading v. Liziz Plantation Sdn Bhd [2017] 8 CLJ 491 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 101

Road Transport Act 1987, ss. 84, 85A

Town and Country Planning Act 1976, s. 22

For the appellants - Rishwant Singh & Noor Muzalifah Shabudin; M/s Cecil Abraham & Partners

For the respondent - HY Lee, Wong Huei Chin & Angus Tiong; M/s Tiong & Woon

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: 22NCVC-577-12-2014 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Stephen Chung JCA:

Background Facts

[1] The first appellant obtained an offer from the Kementerian Kerja Raya Malaysia (KKRM) *via* a letter dated 9 November 2011 to erect three unipole advertising structures including the unipole measuring 60' x 40' at KM6.5, FT 190 Jalan Bukit Kemuning, Seksyen 33, from Kampung Baru-Hicom to Klang, Selangor.

[2] By a letter dated 12 April 2012, the first appellant obtained approval from KKRM to erect an advertising billboard at a federal road reserve at KM6.5, FT 190 Jalan Bukit Kemuning, Seksyen 33, from Kampung Baru-Hicom to Klang, near to KM6.5 Kesas Highway which was maintained by the respondent as the highway concession holder. The first appellant also obtained approval from Majlis Bandaraya Shah Alam (MBSA). The second appellant entered into an outdoor display contract with Bandar Rimbayu Sdn Bhd in respect of this unipole advertising structure which was erected on or about 29 September 2013.

[3] In the suit, the appellants pleaded that on 7 July 2014 the respondent had wrongfully and without permission taken down the billboard at the location. On 13 July 2014 the appellants again erected the billboard at the same location which was taken down again by the respondent on 14 July 2014. The appellants pleaded that for the third time they re-erected the billboard at the same location on 29 September 2014 which was again taken down by the respondent on the same day. The appellants pleaded that the

A wrongful removal of the billboard had caused their client Bandar Rimbayu to terminate the agreement with the appellants. The appellants sued the respondent for losses which were set out in paras. 16 to 21 of their statement of claim. The first appellant claimed a sum of RM1,260,540.59 and the second appellant RM2,825,950 and for injunctive reliefs.

B **[4]** The respondent denied any knowledge of any approval given by KKRM for the unipole advertising structure at the location which the respondent pleaded was erected illegally on federal road reserve land under its concession and that it had trespassed onto the respondent's property.

C **[5]** The respondent filed a counterclaim against the appellants for losses and damages suffered due to delay to the respondent's road widening and upgrading works caused by the obstruction of the unipole structure at a rate of RM30,000 per day until it was removed and for damages of RM371,000 to be paid to Gelumbang Jaya Sdn Bhd and costs of RM38,400 being costs for vinyl application.

D **[6]** After a full trial, the High Court dismissed the appellants' claims and allowed the counterclaim by the respondent. This is the appeal by the appellants against the decision of the High Court.

The Appellants' Submission

E **[7]** The appellants submitted that the learned High Court Judge had erred in dismissing the appellants' claims against the respondent and erred in awarding damages for trespass of RM12,540,000 computed at RM30,000 per day from 10 December 2014 to 31 January 2016 (481 days) to the respondent, a sum of RM371,000 to Gelumbang Jaya Sdn Bhd and
F RM38,400 being the purported cost incurred for vinyl removal.

[8] The appellants submitted that they were acting pursuant to the directions and approval of KKRM and MBSA in constructing the unipole and advertisement billboard at the location which the High Court had
G entirely failed to appreciate.

[9] The appellants argued that the respondent failed to demonstrate that it was the registered proprietor and/or an exclusive lawful occupier of the land and/or the location in respect of which the unipole and the advertisement structures were erected which the High Court again failed to
H appreciate.

[10] It was submitted that the respondent was not entitled to remove the unipole advertisement structure without the prior consent of the appellants and that the appellants should be given the opportunity to relocate the unipole advertising structure to a newly approved location.

I **[11]** The learned High Court Judge erred in law and in fact in holding that the first appellant was liable to pay the sum of RM12,540,000 to the respondent in the absence of evidence that the respondent in fact suffered a total loss of RM12,540,000.

[12] The learned High Court Judge erred in law and in fact in holding that the first appellant was legally required to pay a sum of RM371,000 to Gelumbang Jaya Sdn Bhd who is not a party to the proceedings. It was submitted that no evidence had been elicited that Gelumbang Jaya Sdn Bhd had indeed suffered any loss let alone a loss of RM371,000 and therefore the learned High Court Judge fell into error in making the above awards against the appellant in favour of Gelumbang Jaya without having Gelumbang Jaya appeared in court to prove its case. In so doing, the principles of natural justice were not adhered to.

The Respondent's Submission

[13] The respondent submitted that it was the concession holder having exclusive possession of the entire Kesas Highway/Lebuhraya Shah Alam. It was submitted that the appellants had failed to produce any cogent evidence to prove that the unipole was erected at KM6.5 and on the contrary, the respondent had produced overwhelming evidence to prove that the unipole was erected at KM31.6 Kesas Highway. Although the appellants obtained approval from authorities, such approval was only for erection of unipole at KM6.5. The approval should not be used as a shield by the appellants to justify their wrongful trespass to respondent's territory at KM31.6 Kesas Highway.

[14] It was submitted that the appellants had failed to challenge the respondent's evidence which established that the respondent had acquired exclusive right to possession to the land *via* the concession agreement with the Government of Malaysia.

[15] The respondent submitted that the appellants had trespassed onto the respondent's right of way along the Kesas Highway and clearly had intention to trespass and had interfered with respondent's right of way by their intentional unlawful entry, wrongful erection of the unipole and subsequently when their unipole remained at KM31.6 due to their failure to remove the same. It was submitted that it is trite law that a trespasser has no right in law or in equity and despite more than sufficient notice given to the appellants, they failed to reply to the respondent's notice and had failed to remove the unipole.

[16] The appellants' wrongful erection of the unipole had caused the respondent to suffer losses and damages. Due to the obstruction caused by the unipole, the respondent's road widening and upgrading works had suffered delayed which resulted in extra costs and penalties. It was submitted that SD11 had testified that the delay resulted in costs of RM30,000 per day. The respondent argued that it had to pay damages of RM371,000 to Gelumbang Jaya Sdn Bhd, which had the exclusive right to billboard advertising in LSA, for breach of contract. The respondent had also incurred costs of RM38,400 for the removal of vinyl.

[17] The respondent submitted that there is nothing plainly wrong or perverse in the learned trial judge's findings on both law and facts in this case and there is no compelling reason for the appellate court to resort to appellate intervention.

The Court's Decision

[18] In this appeal, it was the appellants' contention that the High Court fell into error by deciding the matter independent of pleadings, in the absence of evidence, independent of evidence actually led and independent of submissions actually made which required appellate intervention. It was submitted that the High Court failed to appreciate the fact that the unipole advertisement structure was rightfully erected by the appellants at the approved location by KKRM and MBSA ie, at KM6.5, FT 190, Jalan Bukit Kemuning. This appeal centered on the finding of facts by the learned trial judge.

[19] It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist (s. 101 of the Evidence Act 1950). Where a party on whom the burden of proof lay had discharged that burden, then the evidential burden shifted to the other party. But if the party on whom the burden of proof lay failed to discharge it, the other party need not call any evidence: *Hong Yik Trading v. Liziz Plantation Sdn Bhd* [2017] 8 CLJ 491; [2017] 5 MLJ 398.

[20] It was not in dispute that under s. 85A of the Road Transport Act 1987 (RTA), KKRM had the jurisdiction to approve the construction of the unipole structure. Under s. 22 of the Town and Country Planning Act 1976, MBSA had jurisdiction to approve the construction of the unipole structure at the approved location. It was also not in dispute that the appellants were merely acting in compliance with the approvals granted by KKRM and MBSA in constructing the unipole structure and did not receive any notice under s. 84 RTA to remove the structure. The question is, was the unipole advertising structure erected at the correct location?

[21] In Lampiran 'A' to the letter of offer dated 9 November 2011 (exh. P2), the first appellant obtained an offer from KKRM to erect three unipole advertising structures on federal road reserve, including the unipole in this case measuring 60' x 40' at KM6.5, FT 190 Jalan Bukit Kemuning, Seksyen 33, from Kampung Baru-Hicom to Klang, Selangor. By the letter dated 12 April 2012 (exh. P3) the first appellant obtained approval to erect the unipole advertising structure with "Lokasi Struktur Paparan: Seksyen 33/KM6.5, FT 190, Jalan Bukit Kemuning, Dari Kampung Baru Hicom Ke Klang, (Berdekatan KM6.5 Lebuhraya Kesas)". Both letters were signed by PW2. The words inside the brackets that it was near to KM6.5 Kesas Highway should serve as a guide or warning as to its exact location where to erect the structure.

[22] Reading the above words inside the inverted comas, the location of the unipole structure to be erected was at KM6.5 Jalan Bukit Kemuning and not at KM6.5 Kesas Highway. The two locations were near to each other, by a difference of about 30 metres, as shown in a land survey plan (Plan No. JAM/SEL/2356/B3 at p. 138 of common core bundle of documents [CCBD]) and in a photograph (p. 398 CCBD), showing Kesas Highway running parallel to Jalan Bukit Kemuning with a road reserve in between. In his witness statement, SP2 testified that in approving the location of the structure at KM6.5, FT 190, Jalan Bukit Kemuning, Shah Alam, he did not know that it was within the reserve land or right of way of Kesas Sdn Bhd.

[23] PW1, the managing director of the appellants, in Q&A 4 of his witness statement, said that sometime in September 2013, the first plaintiff has caused his billboard structure together with the visual of Bandar Rimbayu (the said visual) to be erected on the said location. In cross-examination, he said in applying for the location for the billboard, "we will spot a location where to build … we will try to find out what are the landmark which is nearby the billboard. And we will use this as the first initial reference. Subsequently, we will apply to the authority." He said they applied for the location in Jalan Bukit Kemuning but it did not have any kilometer tag and the location was approved by the authority, KKRM and MBSA. He was asked before KKRM's approval, based on his application, whether he did anything to verify the location and he answered he believed the authority was the one responsible in doing this. Obviously the appellants did not carry out any survey to verify the exact location. Instead, they relied on the site plan provided by KKRM and MBSA (see Q&A 17 and exhs. P13(a)-(c)). Although PW2 testified that based on his site visit that the structure was erected at KM6.5 pursuant to the approvals of KKRM and MBSA, PW2 did not prepare the site plan and was not in a position to confirm the accuracy of the site plan or the location of the unipole advertising structure. The consultants who prepared the site plan were not called to testify as such. Any developer or contractor including the appellants would have, and should have, carried out a survey to confirm its exact location before erecting the unipole advertising structure.

[24] Although the appellants submitted that they should be given the opportunity to relocate the unipole advertising structure to a newly approved location, as early as 27 September 2013, *via* a letter of same date, the respondent warned the first appellant that the respondent was given a concession by the Federal Government to operate and manage the reserve land for Lebuhraya Shah Alam and that the first appellant had illegally commenced to construct a structure for billboard advertisement at KM31.6 Arah Barat Lebuhraya Shah Alam. By a letter dated 15 January 2014, Lembaga Lebuhraya Malaysia informed KKRM that the location of the unipole advertising structure being erected by the first appellant at KM31.6 was within the land reserve and right of way of the respondent. Without taking steps to verify the situation and or the location, the appellants

continued to complete the construction of the structure which resulted in the respondent taking down the billboard on 7 July 2014. Instead of carrying out a survey to verify the exact location, on 13 July 2014 the appellants again erected the billboard at the same location which again was taken down by the respondent. It happened the third time.

[25] Pursuant to a concession agreement dated 19 November 1993 between the Government of Malaysia and the respondent, the Government granted exclusive right and license to the respondent to enter and occupy the land in relation to the highway concession. The respondent had carried out a survey for demarcation of the right of way near KM31.6-KM31.7 Lebuhraya Shah Alam (Kesas) including verification of unipole billboard encroachment (see exh. D34). The survey showed that the unipole advertising structure was located at KM31.67 Kesas Highway which had encroached onto Kesas Highway.

[26] On evidence, the learned High Court Judge was correct in his finding that the appellants erected the unipole advertising structure at the wrong location namely at KM6.5 Kesas Highway, and not at KM6.5, FT 190, Jalan Bukit Kemuning as applied and approved and had trespassed onto the land reserve of the respondent. This is a finding of fact amply supported by the evidence in the record of appeal and we do not find any reason to disturb that finding. It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a Court of Appeal unless it appears that those findings are clearly wrong especially the trial judge has seen and heard the witnesses: see *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163; [1996] 2 MLJ 517. We were unanimous that the appellants had failed to prove their claims against the respondent. We dismissed the appeal on the issue of liability and affirmed the High Court's finding of liability.

[27] However, with regard to the issue of quantum, we were unanimous in our decision that the learned High Court Judge had erred in awarding the damages against the appellants as prayed for. The respondent had submitted that it had produced strong and cogent evidence to establish their counterclaim against the appellants, particularly in respect of the trespass onto Kesas Highway. The respondent contended that the appellants' wrongful erection of the unipole structure had obstructed and prevented the respondent from carrying out its road widening and upgrading works at that location and caused delay to its works. The respondent submitted that the delay resulted in prolongation costs and penalties at a rate of RM30,000 per day from 10 December 2014.

[28] The respondent did not specifically lead evidence on damages for the trespass. The respondent also did not give a breakdown of this figure of RM30,000 or how it was derived in the defence and counterclaim. It is trite that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving both the liability and quantum of

damages before he can recover the sum claimed. It is not sufficient for the claimant to merely state the amount of damages, he must prove the damage that he had in fact suffered to the satisfaction of the court: *Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd* [2014] 6 CLJ 269.

[29] In para. 16(a) of the defence and counterclaim, the respondent claimed the aggregated sum of RM30,000 per day from 10 December 2014, ie, from the date the contractor had to stop work because the first appellant's structure was still located at the site of the road widening works of Lebuhraya Shah Alam until the billboard was removed from the location, for costs of piling works, pile embankment, reinforced earth wall, mobilisation costs and insurance. These costs were not set out in the pleadings and the respondent did not produce any documents such as invoices, bills or receipts to substantiate these costs or claims.

[30] DW6 was asked about a claim for penalty of RM10,000 for each day of delay as notified by LLM. There was no explanation for this penalty or delay and he confirmed that no payment had been effected. He was also asked about idling machineries costs of RM15,000 per day and he confirmed this was not paid. These were estimates. DW5 from Budaya Restu had testified that the machineries could be moved and used at other sites and did not incur idling machineries costs. Reading exh. D50, the respondent was only entitled to carry out road widening works commencing 23 October 2014, and not from 10 December 2014. This was confirmed by DW6. Therefore the claim for delay at RM30,000 per day from 10 December 2014 could not be correct. DW4 and DW6 could not produce any record to show the alleged delay or the length or number of days of delay.

[31] The respondent had appointed Budaya Restu as its contractor to carry out the road widening works. In the event of delay in carrying out the works, Budaya Restu had to pay liquidated and ascertained damages (LAD) of RM5,066.95 per day to the respondent. This figure was way below the sum of RM30,000 per day. In any event, DW5 testified that the LAD was supposed to start by 2 March 2016 and there was no complaint and no claim for LAD by the respondent. This would contradict the respondent's assertion that it had incurred loss as a result of the delay at RM30,000 per day: see *Dr M Mahadevan Mahalingam v. S Lourdenadin & Another Case* [1988] 2 CLJ 601; [1988] 1 CLJ (Rep) 168; [1988] 2 MLJ 371.

[32] On the next two items of its claims, the respondent submitted that it had to pay Gelumbang Jaya a sum of RM371,000 for breach of contract which had the exclusive right to billboard advertising in Lebuhraya Shah Alam and that it incurred costs of RM38,400 for removal of vinyl. Firstly, the respondent did not produce any invoices, bills or receipts that it had incurred or paid the sums of RM371,000 and RM38,400. Secondly, Gelumbang Jaya and the other unnamed party were not parties in this suit and did not claim against the respondent or the appellants for these sums. They were not called as witnesses to prove their claim as such.

A **[33]** Reading the appeal record, the respondent has failed to prove specifically the damages prayed for in the defence and counterclaim. We set aside the High Court orders on special and general damages. We awarded a nominal sum of RM50,000 as damages for the trespass, which we considered to be fair and adequate, to be paid by the appellants to the respondent. The
B cost granted by the High Court in the sum of RM100,00 is affirmed, parties to bear their own costs in this appeal and deposit to be refunded.

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